

of an audience and financial support. In short, the applicant must propose a program service and operation that is not merely theoretical, but has a real chance of being a viable noncommercial operation.

Under this factor, the applicant should demonstrate the manner in which its proposed services (broadcast and related nonbroadcast services) would support the applicant's defined objectives. The Commission should evaluate and weigh proposals to determine how well they are aimed at meeting the applicant's objectives. To the extent that proposed services are more closely aligned with or will better support its stated objectives, an applicant can be given greater credit under this factor.³⁰

If, for example, a television applicant's objective is to provide broad educational services to the community, a proposal to provide a wide range of instructional programming to schools or to viewers in the community would better support this objective than a proposal to provide only a narrow range of instructional programming or a proposal to provide in-house vocational training to students.

To the extent that an applicant's proposed service includes community outreach components designed to extend the value of an applicant's educational or cultural program service to the community, the applicant should receive credit for this under the integration criterion. The Commission's favorable recognition of the community outreach component of an applicant's proposed service will help lead the Commission to a final determination that will best serve the public interest.

³⁰ See, e.g., *Southeastern Bible College I*, *supra* at 957 (institutional applicant proposing to produce most of its own educational programming, favored over institutional applicant relying chiefly on syndicated programs); *East Tennessee Public Communications Corp*, 2 FCC Rcd 685, 688 (1987) (preference awarded to applicant with most specific and workable educational programming proposal ("*East Tennessee*")); *Maricopa County*, *supra* at 4091 (1990) (applicant's proposed home health care format held not to adequately support educational or cultural objectives).

The Board of the Applicant Includes Representatives of Educational, Cultural and Community Institutions or Organizations

The Commission should also look to the composition of the board of the applicant as one factor in evaluating whether the applicant's service will support its objectives. It is the governing board of a public broadcast entity that is responsible for seeing that its objectives are adequately achieved through its broadcast and nonbroadcast services. To the extent that the licensee's governing board is composed of representatives from educational, cultural and community institutions or organizations, the board is better positioned to insure that the licensee develops services and operates in a way that supports its educational and cultural goals. Accordingly, the Commission should properly consider whether the governing board of the applicant is composed of people that are in a position to support the stated educational and cultural goals of the applicant.

The Commission should make it clear that, in applying this factor, the ALJ should not engage in a detailed comparison of which applicant may have more, or more renowned, community, educational, civic or cultural leaders on its board. An applicant should be seen as meeting the minimum standards of this factor if it demonstrates a board composition that is generally representative of the educational, community and cultural organizations in the community that are most closely aligned with its stated objectives.

The Commission Should Consider an Applicant's Ability to Effectuate Its Proposal

Administrative Law Judges have in past cases considered an applicant's ability to effectuate its proposal as an "other factor" in the noncommercial comparative analysis. *Maricopa County, supra* at 4092-93; *East Tennessee, supra*, at 688. The Public Broadcasters believe that the Commission should formally

recognize this as a factor to be explored at hearing under the "integration of services" criterion.

Evidence that a proposed service can effectively be implemented could include:

- commitment of existing resources, including proposals to share facilities and personnel with existing stations operated or activities conducted by the applicant;
- staffing plans that are realistic in relation to the nature of the applicant and the size of the community to be served;
- demonstrated qualification of the applicant for funding under criteria established and defined by funding agencies that support public broadcasting; and
- an applicant's past record of providing broadcast and related nonbroadcast services that have supported its educational or cultural objectives.

The Public Broadcasters believe that this comparative factor can be distinguished from basic financial qualifications required by public broadcast applicants. *See KQED, Inc.*, 5 FCC Rcd 1784, 1785 (1990). This proposed effectuation factor would assist in the prediction of the applicant's ability to eventually provide a diverse and useful broadcast service to the public. Firm commitments of funds from organizations such as the CPB and the National Telecommunications and Information Administration (NTIA) should not be required and could not be expected. On the other hand, the guidelines for eligibility for CPB's Community Service Grants and NTIA's Public Telecommunications Facilities Program can be readily established at hearing and an applicant's qualifications for funding under these programs could be determined. Similarly, guidelines for funding under state

programs and private foundations can be established and an applicant's eligibility for funding determined.

2. Service That Best Meets Community Needs

The Public Broadcasters submit that the Commission should formally recognize as a noncommercial comparative criterion the manner in which the proposed services (both broadcast and related nonbroadcast) will meet the needs of the community of license.

First, the deletion of this factor is not required by the Commission's 1984 *Public Broadcasting Deregulation Order*. In that Order, the Commission did not eliminate public broadcasters' obligations to determine and serve community needs. It merely determined that the formalized ascertainment process that it had imposed on public broadcasters was unwarranted. The Commission stated:

Instead of focusing on these formalistic requirements, we believe licensees should be afforded wide discretion to determine how community needs should be ascertained and met.

Id. at 752. The Commission reasoned that formal ascertainment requirements were unnecessary "in light of the special direct contact that public stations have with the public by virtue of their noncommercial status" The Commission cited "social forces" that "serve as a reliable substitute" for its ascertainment requirements, including the need for public stations to serve their audience's needs and desires to insure continued viewer contributions and the representative nature of stations' governing boards. *Id.* at 754. In short, the Commission has never removed the basic obligation of public broadcasters to "continue to serve the significant programming needs of their communities." *Id.* at 752.

The "community needs" criterion first articulated in *Pacifica Foundation* is not only still viable after the 1984 *Public Broadcasting Deregulation Order*, but it is critical to a public interest determination. The absence of such a criterion in a comparative analysis would leave the Commission with no reasoned basis to distinguish among competing applicants. Under the first prong of the test, if an applicant proposes services that support a narrow educational or cultural objective, the applicant may not necessarily be disfavored in comparison with an applicant whose proposed services support broader educational objectives. The "community needs" prong of the noncommercial comparative issue is absolutely essential to insure that the winner is also the applicant that will best serve the needs and interests of the community.

The Public Broadcasters submit that the test articulated by the Review Board in *Seattle Public Schools* is the proper one: the applicant "must at least show that it has broadly surveyed (in a flexible fashion) its community, and that its proposal is responsive to that survey . . . " *Seattle Public Schools, supra* at 642.

As with the first criterion, the Commission can and should articulate factors that it will consider in determining an applicant's ability to assess and respond to community needs. Public Broadcasters suggest that the following factors are relevant:

Determining Public Needs

An applicant that has a process in place to determine educational and cultural needs should receive credit. This process need not be a formal ascertainment, but rather any reasonable method to determine these community needs.

Supporting Identified Needs

Under the first prong of the test, the applicant receives credit if it can show that its proposed services (broadcast and related nonbroadcast services) are aimed at supporting its educational or cultural objectives. Under this second prong, the applicant should receive credit where it shows that its proposed services and objectives will meet identified needs in the community.

Community Representation

The applicant should also receive credit if its governing board is broadly representative of the community to be served. As the Commission noted in its 1984 *Public Broadcasting Deregulation Order*, the various types of boards of public broadcast licensees can serve as a reliable substitute for formal ascertainment. The Commission correctly recognized that many stations are, through their boards, under direct public control. To the extent that an applicant can show that its board is broadly representative of the community to be served or is accountable to the public (e.g., stations licensed to state or local government institutions where members of the board are accountable to the public through an election process), this can constitute evidence of an applicant's ability to assess and respond to community needs.

Applicant's Past Record

To the extent an applicant can demonstrate a past record of assessing the educational and cultural needs of the community of license, and a record of providing services in support of those needs, the applicant should receive additional credit under the "meeting needs" criterion.

Diverse and Alternative Noncommercial Service

A basic goal of public broadcasters under the *Public Broadcasting Act* is to provide “diversity of programming” that will meet the “unserved and underserved” needs of the the community.³¹ As discussed above, this goal is fostered by structure and funding mechanisms in public broadcasting. See Part I.A. *supra*.

The Public Broadcasters advocate that, in communities where there is one or more noncommercial station, the Commission should further encourage this fundamental objective of public broadcasting by giving credit to any applicant that proposes diverse and alternative noncommercial educational services. A public broadcast applicant should not be foreclosed from receiving credit under this factor for a proposal that includes some duplicated program services distributed nationally by NPR, American Public Radio (APR), or PBS as long as the applicant proposes to provide local or other programming intended to reach diverse audiences.

3. Other Factors

As noted above, generally, under “other factors,” the Review Board and ALJs have considered areas and populations served by the applicants, hours of operation proposed, and promises to install auxiliary power equipment.³² The Public Broadcasters believe that the Commission should delineate the specific “other factors” that should be included in its comparative analysis and the weight that should be assigned to them.

The Public Broadcasters believe that, because they directly relate to public broadcasting’s mission, the first two criteria—integration of service into educational

³¹ *Public Broadcasting Act, supra* 49 U.S.C. § 396(a).

³² See n.5 *supra*.

and cultural objectives and meeting community needs—should be afforded more weight in the comparative process. "Other factors" can be considered but should be afforded less weight.

APTS and NPR suggest that the following "other factors" (some of which have been applied in the past and some of which have not) would be relevant to a determination of the applicant that would best serve the public interest:

Comparative Coverage and Service Expansion

Public Broadcasters submit that this factor, which has long been applied in commercial comparative analysis³³ is even more relevant in the noncommercial context.³⁴ In the Public Broadcasting Act of 1967, Congress has found that:

[I]t is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States.

47 U.S.C. § 396(a)(7).

³³ The Commission has long granted a slight preference to applicants proposing substantially greater overall coverage than their opponents within a well served market. See e.g. *Simon Geller*, 90 FCC 2d 212, 268-69 (1982) (coverage superiority of four times more area and 315,000 persons entitled to slight preference); *Christian Broadcasting of the Midlands, Inc.* 99 FCC 2d. 578, 582-83 (Rev. Bd. 1984). The Commission has also held that an applicant is entitled to a slight preference for introducing a third service to a community. See *Maricopa County, supra* at 4093 (citing *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1113 (Rev. Bd. 1984)). The Commission will award a "moderate" preference to applicants awarding a second service to a community, see *Real Life II, supra* at 2579 (citing *Communications Properties Inc.*, 92 FCC 2d 45 (Rev. Bd. 1982) (moderate preference awarded to second night time service to 4,456 persons); and a "substantial" preference to applicants proposing to provide service to an area with no existing aural service. See *CJL Broadcasting Inc.*, 88 FCC 2d 750 (Rev. Bd. 1981).

³⁴ This factor should not be confused with the analysis undertaken in the context of Section 307(b) of the Communications Act. Section 307(b) is only applied where "competing applicants specify different communities of license for their proposed stations," requiring the Commission to compare the needs of the respective communities for broadcast service. See *Faye and Richard Tuck, Inc.* 3 FCC Rcd 5374 (1988).

Fourteen percent of the American population is still unserved by a public radio signal.³⁵ Congress has specifically recognized the importance of bringing public radio service to these areas, as well as increasing the diversity of programming and audiences served.³⁶

To further this congressional goal of expanding noncommercial broadcast service, particularly public radio, to all the citizens of the nation, Public Broadcasters believe that the Commission should grant a substantial preference to those noncommercial applicants demonstrating a workable ability to extend noncommercial broadcast service to unserved or underserved areas.

Use of Technology

An applicant that proposes to use all available technologies more fully and efficiently to serve the educational and cultural needs of the community should be awarded credit under the "other factors" criterion. This would include proposals to use the subcarrier capacity for radio reading services, closed captioning, descriptive video services or second language audio services.³⁷

³⁵ See "Public Broadcasting Coverage in the United States," National Telecommunications and Information Administration, 1989.

³⁶ See House Report, Pub. Telecom. Act of 1991, *supra* at 22; Senate Report on Commerce, Science and Transportation, Pub. Telecom. Act of 1988, S. Rep. No. 100-444, 100th Cong., 2d Sess. 28-29.

³⁷ A radio reading service is an aural service provided primarily for the blind and visually-impaired through an FM licensee's subcarrier capacity. It provides access to printed materials like newspapers, magazines and books for those who are unable to hold or read printed material.

Closed captions are a written version of the audio portion of television programs for the deaf and hearing-impaired viewers. Captioned data is transmitted with the broadcast and decoded by a separate caption decoder attached to the television set. By July, 1993, most sets will be equipped with a built-in decoder.

Descriptive video service (DVS) is an audio narration of a television program for the blind and visually-impaired. The service is transmitted over the Separate Audio Program (SAP) channel that can be received using most stereo TV sets.

Second-language audio uses the same SAP technology for the simultaneous broadcast of second-language soundtracks.

Operational Efficiencies

An applicant that proposes methods of operation that contain efficiencies that will serve the public interest should receive credit under the "other factors" criterion. The Commission has repeatedly recognized that licensees can achieve significant efficiencies if they own and operate more than one station.³⁸ For public broadcasters, who operate with limited and frequently inadequate funds, efficiencies derived from common "ownership" are even more critical. Common management, fundraising efforts, studio facilities, engineering staff, development staff and other operational economies permit licensees with commonly held stations to maximize their resources devoted to programming and public service and thereby provide greater service to their communities. In some cases, efficiencies permit public broadcasters to provide services that would otherwise not be economically feasible.

Given the strong public interest factors generally associated with efficiencies of operation for public broadcasters, we urge the Commission to recognize and give credit to proposals that would permit operational efficiencies by virtue of common "ownership" of noncommercial broadcast facilities. While we recognize that this, like some other factors we have proposed, gives credit to common "ownership" arrangements, we believe that such comparative credit is appropriate because it is intended to permit more efficient use of resources that will in turn expand noncommercial programming service to the community.

* * * *

38 See nn.15 & 16, *supra*.

Public Broadcasters submit that the traditional comparative noncommercial criteria, with the suggested refinements discussed above, are directly related to public broadcasting's educational mission and should be retained as the foundation upon which a valid analytical construct can be based. The factors proposed under each criterion should put needed "meat on the bones." They should provide the ALJs and the Review Board with the guidance needed to assign meaningful preferences to applicants that will ultimately lead to valid public interest determinations.

D. The FCC Should Eliminate the "Share-Time" Concept

In *New York University II*, the Review Board first ordered "time sharing" between two noncommercial FM applicants (New York University and Fairleigh Dickinson University) for the last remaining noncommercial FM frequency in the New York City metropolitan area. In that case, the administrative law judge already had made the determination that no significant and meaningful differences existed between the two applicants and the arrangement was ordered as a "last resort" to resolve an especially complex comparative case.

Since *New York University II*, the concept of "share-time" has come to be a part of many noncommercial educational radio comparative cases. A typical hearing designation order will ask the question whether a share-time arrangement between the applicants would result in the most effective use of the channel and better serve the public interest. As a result, noncommercial applicants have had to devote significant effort and expense to addressing this issue, with no apparent benefits.

Public Broadcasters urge the Commission to use the instant proceeding to eliminate this unnecessary and generally impractical issue from noncommercial

comparative cases. The Review Board in *New York University II* described the situation as involving a "unique problem."³⁹ Whatever the utility of the share-time arrangement ordered to resolve the special circumstances involved there (large metropolitan area where even a tiny fraction of the population is a substantial audience; two teaching institutions with significant student training objectives; last available reserved FM frequency, etc.), there is no evidence to support the theory that these arrangements generally promote the most effective use of the channel or better service to the public. In fact, research findings and practical experience demonstrate that the opposite is true.

Dr. Donald Mullally of the University of Illinois⁴⁰ testified recently in a noncommercial comparative case concerning the consequences of time sharing by public radio licensees. Based on his survey of the literature and empirical evidence, he concluded that:

It is my considered opinion, therefore, that the public interest is better served and the available spectrum is put to better and more effective use in the service of the public by avoiding shared-time use and encouraging an award of an available frequency to that applicant whose proposed service prevails on its merits in the arena of a comparative hearing.

In forming this conclusion, Dr. Mullally reviewed the findings of "Audience 88: A Comprehensive Analysis of Public Radio Listeners,"⁴¹ and "The Report of the

³⁹ *New York University II, supra* at 122.

⁴⁰ Dr. Mullally is on the faculty of the University of Illinois where he has taught courses in broadcast management and audience research since 1969. He is also the Director of Broadcasting at the University of Illinois and the General Manager of WILL-AM-FM-TV. Dr. Mullally was the public radio representative on the FCC's WARC-92 Advisory Committee. He testified in *Maricopa County, supra*.

⁴¹ "Audience 88: A Comprehensive Analysis of Public Radio Listeners" was funded by CPB and published in six parts. It was written by David Giovannoni of Audience Research & Analysis, Silver Spring, Maryland, T.J. Thomas and T.R. Clifford of Thomas & Clifford, Takoma Park, Maryland, and Linda K. Liebold of Liebold & Associates, Annapolis, Maryland.

Audience-Building Task Force (ABTF)."⁴² These studies revealed that successful public radio stations have a well-defined mission and consistent program schedule. These stations work on creating a solid public identity, which in turn maximizes listenership, listener loyalty and support, and assures programming responsive to community interests and needs. A share-time arrangement has built-in impediments to program schedule consistency and this type of stable station identity.

In addition, Dr. Mullally supervised a telephone survey of the fourteen noncommercial FM stations listed in the 1989 Broadcast/Cable Yearbook as sharing time on a particular frequency. All stations reported that their ability to accomplish their mission was impeded by the shared-time constraints. His survey revealed the following: one station had left the air, leaving the frequency exclusively to the other; two of the stations offered no programming at all during the summer; another station operated so infrequently it could not be reached through repeated phone calls; six stations, operating regularly on three frequencies, reported that their service to the community was impaired by the shared-time arrangement; and, only two of the 14 stations are CPB-qualified.⁴³

Significantly, the concept of shared-time is not applied in the commercial context, even where there are close contests between applicants. The

⁴² "The Report of the Audience Building Task Force," July, 1986. The Task Force included Dr. Mullally, ten public radio managers, program directors and a public member of the NPR Board. The Report was accepted by the NPR Board and widely disseminated throughout the public radio system.

⁴³ CPB has developed a series of qualifications, necessary for the receipt of congressionally-appropriated funds, that are designed to further the policies articulated by Congress in the *Public Broadcasting Act*. Among these is a minimum requirement of an 18-hour-per day program schedule and 365-day-per-year operation. These are intended to foster a consistent service that will meet public needs. New shared-time stations would be unlikely to be able to meet these CPB requirements and thus would be precluded from meaningful access to national programming from distributors such as PBS, NPR and APR.

noncommercial context is no more appropriate for shared-time since public interest considerations should be paramount in the award of all noncommercial licenses. The Commission should remove this issue from mandatory consideration in noncommercial cases.

In a case in which competing applicants choose to join forces and meld their operations into a joint service as an alternative to going through the expense of a comparative contest, or to otherwise agree to share a frequency, this voluntary shared-time could be allowed, but applicants should not be forced to consider this type of arrangement.⁴⁴

NPR and APTS believe that shared-time arrangements, as a general rule, are contrary to the public interest and should not be imposed on noncommercial applicants. The clarification of the noncommercial criteria offered herein should remove the impetus to resort to this type of solution in noncommercial cases and should assure that principled criteria and public interest considerations underlie the award of noncommercial licenses.

**E. The Same Comparative Factors Should Be Applied to
"State-Owned" Licensees**

The Commission has asked whether a different comparative approach should be followed for "state-owned" public broadcasters as opposed to other noncommercial applicants (*Notice*, para. 40). APTS and NPR believe that the Commission should not craft a separate set of criteria for state applicants.⁴⁵ State

⁴⁴ Apparently, 12 of the 14 part-time FM stations in Dr. Mullally's study resulted from negotiated shared-time agreements. These were reached by applicants facing comparative hearings that would have required litigation of the share time issue.

⁴⁵ Presently, 57% of public radio and 39% of public television stations that are CPB-qualified are licensed to state or local governmental entities. This includes 19 state television networks and 7 state radio networks which cover part or all of their states.

applicants rarely, if ever, face off in a comparative proceeding. Any contest involving a state applicant will generally involve a state institution and a non-profit licensee. Under these circumstances, a single set of criteria is required for a meaningful comparison.

A state applicant can receive credit in a comparative analysis where its particular range of proposed services and operation advance the public interest goals embodied in comparative factors proposed herein. For example, a state network applicant may receive credit because it proposes to serve unserved or underserved areas and populations; it proposes methods of operation that contain efficiencies that will serve the public interest; or it is deemed better able to effectuate its proposal.⁴⁶ Thus, a separate analytical framework for weighing the proposal of a state institution or state agency appears to be unnecessary.

The development and extension of state broadcast networks in this country has clearly made possible the provision of service to rural areas that may have had difficulty supporting their own local public broadcast station.⁴⁷ The merits of future proposals by states and state entities can be fairly and fully considered under the factors proposed herein for all noncommercial station applicants.

⁴⁶ Application of the comparative factors, as proposed above, would not necessarily tip the scales in favor of a state applicant. A state network applicant could be assessed a comparative disadvantage on factors such as determining the educational and cultural needs of the community; having a broadly representative board, or demonstrating a past record of serving local community needs.

⁴⁷ For example, state-licensed networks furnish public television service to virtually the entire geographic area of such states as Alabama, Georgia, Iowa, Kentucky, Louisiana, Mississippi, Maryland, Nebraska, Oklahoma and Oregon. Non-profit corporations also operate state networks, as is true in Connecticut.

III. THE COMMISSION'S PROPOSED MODIFICATIONS IN THE COMMERCIAL COMPARATIVE CONTEXT ARE NOT USEFUL IN THE NONCOMMERCIAL CONTEXT

A. The Proposed New Commercial Criteria Are Generally Neutral Factors for Noncommercial Applicants

The Commission also requests comment on additional criteria or comparative preferences, including a "service continuity preference" and a "finder's preference." In general, these criteria will probably add little to distinguish one noncommercial applicant from another. If the Commission determines that these criteria are appropriate in the commercial comparative context, we would have no objection to the use of the service continuity factor in the noncommercial area, but argue that the finder's preference be applied in a noncommercial proceeding under only the limited circumstances described below.

1. Service Continuity Preference

The Commission proposes to award credit to applicants committing themselves to own and operate the station for at least three years. The preference is intended to encourage successful applicants to retain the broadcast license for a significant period of time.

In the noncommercial context, public radio and television licenses are transferred very infrequently. While the members of community or institutional boards of licensees do change over the years, the actual transfer of station control from one licensee to another wholly unrelated legal entity is a rare occurrence. Although there may be regular changes in the Board of Regents of a university licensee, for example, this does not indicate any change in the governing principles or operating policies of the university's broadcast station. The organizational documents of a nonprofit licensee establish its mission and objectives and these remain constant despite transitions on the governing board.

The Commission should not have any interest in maintaining the composition of the governing board of a noncommercial applicant at the time a license is awarded to it. Indeed, in some situations, such a requirement could disrupt legislatively established procedures.

Because noncommercial licenses are transferred relatively infrequently, a "service continuity preference" would not generally offer the Commission a basis of comparison between two applicants. Nevertheless, Public Broadcasters believe that the purpose behind the preference—to encourage stability of ownership in broadcasting—is generally applicable to noncommercial broadcasters.

If the Commission were to apply this factor in the noncommercial context, it would have to take into consideration the unique governance arrangements in public broadcasting. The Commission would have to make clear, as Public Broadcasters have asked it to do in its pending procedure in *Transfers of Control of Certain Licensed Non-Stock Entities*,⁴⁸ that routine and non-abrupt changes in the governing boards of public broadcast licensees do not constitute a change in ownership.⁴⁹

2. Finders' Preference

The Commission also seeks comment on petitions pending before it proposing the award of comparative preferences to applicants who successfully request the allotment of new broadcast frequencies through rulemaking. In the

⁴⁸ See *Notice of Inquiry in MM Docket 89-77*, 4 FCC Rcd 3403 (1989). The Commission has not taken any further action in that docket.

⁴⁹ "Routine" changes are gradual changes that are in accordance with the organizational documents, and "non-abrupt" changes are less than a majority change in a governing board in a period of less than one year. Public Broadcasters urged the Commission to find that, if these criteria were met, a change in the board members would not constitute a transfer of control and would not require prior approval by the Commission. See *Comments of the National Association of Public Television Stations (formerly NAPTS), National Federation of Community Broadcasters and National Public Radio in MM Docket No. 89-77* (filed July 13, 1989).

noncommercial FM context, there is no Table of Allotments and every application for a noncommercial FM frequency involves some degree of initiative and ingenuity.

Allowing a "finder's preference" for the first-to-file for reserved FM frequencies could encourage a "land-rush" for the remaining noncommercial FM channels, placing an unacceptable premium on filing early applications. As is clear from the preceding discussion, important public interest considerations would be thwarted by a scheme which rewarded the first-filed noncommercial FM application. The Commission's policies should encourage more orderly and cautious development of the noncommercial FM band, consistent with the public interest and congressional goals of expanding public radio service to unserved and underserved areas.

If the Commission does determine that a finder's preference is appropriate for commercial FM frequencies, we request that it be made applicable only to noncommercial applicants who successfully petition the Commission for allocation of a commercial FM frequency. For example, noncommercial applicants are sometimes forced to seek commercial FM frequencies for noncommercial use where there is no available reserved noncommercial frequency due to TV-6 interference problems or Mexican/Canadian border limitations. In such instances, where the noncommercial applicant has gone to the expense of seeking an allocation in the commercial FM band, it is only equitable that any "finder's preference" available to commercial applicants also apply to a noncommercial applicant.

Channels for public television are established in the Table of Allotments for television. See 47 C.F.R. § 73.606. While allowing a "finder's preference" for requesting a new allotment for a frequency reserved for noncommercial television use might encourage the further development of public television, this possibility holds little promise in reality. In light of the Commission's pending proceeding in

allocating spectrum for advanced television technologies (ATV), it is unlikely that there will be "spare" television frequencies, at least in urbanized areas, which could be allocated to public television during the transition years to ATV.⁵⁰

In light of these realities in the noncommercial context, we request that the Commission not add a "finder's preference" to the basic noncommercial comparative criteria.

B. A Point System is Unworkable in the Noncommercial Context

The Commission states that it is considering using a point system, including a tie-breaker, for noncommercial as well as commercial applicants. NPR and APTS urge that a point system not be imposed on noncommercial applicants. The noncommercial comparative criteria, even clarified as suggested above, do not lend themselves to simple quantification. In light of the special mission of public broadcasters to serve the public interest and the reservation of only a limited number of frequencies to accomplish this purpose, a careful case-by-case consideration of each applicant's qualifications is essential. An attempt to quantify the criteria through use of a point system would work against such careful consideration.

The Commission may be able to develop a point system for commercial criteria. If it can, it is only because of the years of experience and literally hundreds of comparative decisions interpreting the commercial criteria. In the noncommercial context, the Commission lacks this substantial foundation of practical experience and legal analysis. The noncommercial criteria, up to this point,

⁵⁰ See *Broadcast Services; Advanced Television Systems* in MM Docket No. 87-268, FCC 92-174, 57 Fed. Reg. 31744, 31748 (May 22, 1992) (FCC will maintain freeze on NTSC applications in major markets, and will cease issuing new NTSC licenses, including noncommercial NTSC licenses, pending conversion to ATV).

have been very generally stated. In addition, because there are so few noncommercial comparative hearings, there is no significant body of comparative case law to support a quantification of the noncommercial criteria. The Commission should not attempt to graft the commercial criteria onto the noncommercial comparative process, as we have discussed above. Such a solution, while convenient, would not do justice to the public interest considerations which must be made in awarding a noncommercial license. Moreover, the number of noncommercial comparative cases is very small and the burden on the Commission slight if the current descriptive system of comparing noncommercial applicants were to be maintained.

CONCLUSION

For all of the reasons discussed above, NPR and APTS respectfully request that the Commission establish criteria, and guidelines for applying those criteria, aimed at selecting the noncommercial applicant that will best serve the educational and cultural purposes for which noncommercial licenses are granted.

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